CORRECTED COPY

IN THE

Supreme Court of the United States

OCTOBER TERM 1976

No. 76-1428

E. GARRISON ST. CLAIR,

Petitioner.

-vs.-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MARTIN JAY SIEGEL
MICHELMAN & MICHELMAN
Attorneys for Petitioner
250 West 57th Street
New York, New York 10019
(212) 586-1410

Dick Bailey Printers, 290 Richmond Ave., Staten Island, N.Y. 10302
Tel.: (212) 447-5358

TABLE OF CONTENTS

Cases Cited

Other Authorities

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1976

No. .....

E. GARRISON ST. CLAIR,

Petitioner.

-vs.-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

Petitioner, E. Garrison St. Clair, prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on March 17, 1977.

OPINION BELOW

The Court of appeals affirms the conviction of the District Court without opinion, and is not yet officially reported. A copy of the order of affirmance appears in the appendix hereto at 1a.*

JURISDICTION

The judgment of the Circuit Court of Appeals for the Second Circuit was entered on the 17th day of March,

---

*References are to petitioner's appendix and are designated "A".

1977. No requests have been made for extensions of time to file this petition. Jurisdiction of this Court is invoked under Title 28, Section 1254(1), U.S.A., and the petition for a writ of certiorari was filed with the Court within 30 days of that date.

QUESTIONS PRESENTED

1. Whether a conviction for violation of 18 U.S.C. 1341 can be sustained upon an insufficiency of legally admissible evidence?

2. Whether a conviction for violation of 18 U.S.C. 1510(a) can be sustained where the delay was caused by acts of the witnesses rather than those of the appellant?

3. Whether the misrepresentation by Petitioner's counsel as to counsel's knowledge and qualifications was such as to cause the petitioner to mistakingly waive his rights against self-incrimination and to deny him effective assistance of counsel?

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Sixth Amendment

Rights of the Accused

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

United States Constitution, Fourteenth Amendment

Section 1. Citizens of the United States

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Indictment #76 Cr 246 was filed on April 4, 1976 and charged the appellant as follows:

Counts 1-6 charged the defendant with violation of 18 U.S.C. 1341 in that it alleged that the defendant knowingly and unlawfully devised a scheme, etc., to obtain monies from various corporations and other commercial entities by means of false and fraudulent pretenses, representations and promises, knowing at the time they were made that they were false and fraudulent.

Count I — Addressee — Barbara Lynn Stores, Inc.

Count II — Addressee — Amerace Corporation

Count III — Addressee — I.C.M. Realty

Count IV — Dismissed

Count V — Addressee — Topps Chewing Gum, Inc.

Count VI — Addressee — Interstate Stores

Counts 7-9 charged the defendant with willfully endeavoring by means of misrepresentation to obstruct, delay and prevent the communication of information relating to the violation by a criminal investigator (Postal Inspector) by each of the following persons:

Count VII — Kari Hopper

Count VIII — May Anne Claire

Count IX — Evangelina Rojas (dismissed)

Prior to trial, the appellant moved the court for suppression of evidence and statements made by the appellant in derrogation of is 5th and 6th Amendment rights and pursuant to Rule 12, FRCP for dismissal of the indictment. On July 26, 1976, the Court, by Honorable George C. Pratt, after a hearing, denied the motion. A copy of said motion, together with supporting affidavits and the government's affidavit in opposition appears in the appendix hereto at 2a.

Trial began on July 26, 1976. Prior to the government's presenting its case, it withdrew count 4. At the end of the government's case, the Court dismissed count 9. Thus, the jury was presented with counts 1, 2, 3, 5, 6, 7 and 8.

On July 29, 1976 the jury found the appellant guilty of all counts.

On October 15, 1976, defendant moved pursuant to FRCP 12(b)(2) for a dismissal of the indictment or in the alternative for an arrest of judgment with respect to all counts, as well as for a judgment of acquittal or directed

verdict of acquittal pursuant to FRCP 29(c), and FRCP Rule 33. On the same date, said motions were denied.

On October 15, 1976. the appellant was sentenced by the Court as follows:

The petitioner was convicted in the United States District Court, Eastern District of New York, after trial before the Hon. George C. Pratt and a jury of twelve on five counts of mail fraud (Title 18 U.S.C., Section 1341) and two counts of obstructing justice (18 U.S.C. 1510), and sentenced as follows:

(a) As to the mail fraud counts, a term of two years in a jail-type or treatment-type of institution for a period of six months, the balance of 18 months suspended and the defendant placed on probation for a period of three years to commence upon release from custody.

(b) As to the obstruction of justice counts, three years in a jail-type or treatment-type institution for a period of six months, the balance of the jail sentence to be suspended and the defendant to be placed on probation for a period of three years to commence upon release from custody.

The sentences on the mail fraud counts to run concurrently with each other, the sentences on the obstruction of justice to run concurrently with each other but consecutive with the concurrent sentences for the mail fraud, and the commencement of the probation period when the defendant is released from custody.

On March 17, 1977, the appeal to the United States Court of Appeals, Second Circuit was denied from the bench without opinion.

On March 19, 1977 a motion for a stay of the mandate of the court was filed. No opinion has been rendered on said motion to date.

Petitioner is at liberty pending the decision of the Court of Appeals with respect to the stay of the mandate.

THE RECORD

The record of the Court of Appeals consists of all filed documents as well as the minutes of trial, sentence and the hearing of petitioner's motion for a new trial.

STATEMENT OF FACTS

A. Motions Prior to Trial

Motion to Suppress

The petitioner moved the Court to suppress all statements given by him to the government during an interview with the United States Attorney's Office upon the grounds that he did not make a knowing and intelligent waiver of his rights against self-incrimination by virtue of the following:

(a) The defendant believed that all matters pending between himself and the government relating to his solicitation for subscriptions to his future publication of a commercial directory were completed with his consenting to a restraining order against his business; his execution of a consent agreement for the permanent cessation of his business; Judge Weinstein's statement in Court to the effect that there was no further need for criminal prosecution; all coupled with the professional incompetency of his then attorney in the latter's failure to advise the petitioner of his right to remain silent and that statements made by the petitioner could and would be used against him in a criminal proceeding.

The Court denied the motion to suppress the evidence.

B. The Trial

1. The Government's Case

The government's case with respect to the mail fraud counts was based chiefly upon the testimony of seven corporate officials who stated in effect that although their

companies had received invoices for unsolicited advertising in the petitioner's directory that they did not recall receiving notices of solicitation together with said invoices which would have indicated to their respective companies that the invoices were part of a solicitation by the petitioner for listing in his directory. Said witnesses testified as follows:

1. Patricia Stackhouse stated that she was the Assistant Purchasing Manager for Interstate Stores and sat in as secretary of the President; that she received an envelope addressed to Accounts Payable, together with an invoice for a listing in the petitioner's directory and a return envelope bearing the petitioner's return address, which came to her *after* having gone to the mailroom and the Accounts Payable Department (pp. 32-34); and that the invoice was never paid (p. 35). She also testified that *she could not state positively that the covering letter of solicitation was not enclosed* (p. 36).

2. Donald Reef testified that he was the Vice President and Controller of Topps Chewing Gum, Inc. (p. 38); that he received the petitioner's invoice (p. 38); that he marked it "do not pay without my signature"; that *he received such invoice third-hand* after it had come through the mailroom and Accounts Payable Department (p. 41); and that *he could not state that his company did not absolutely receive petitioner's covering letter of solicitation.*

3. Richard Selenka testified that he was the Executive Vice President of Barbara Lynn Stores, Inc. (p. 108); that he received the petitioner's invoice *after* it came to him from the mailroom and Accounts Payable Department (p. 113); that *he could not positiveiy state that he never saw the petitioner's covering letter of solicitation.*

4. Ronald J. Scotto testified that he was employed by the Kings Corporation (not mentioned in the indictment); that he was the Corporate Accounting Manager (p. 131); that

the mail was received by the receptionist, sent to Accounts Payable, and then reached him (p. 122); that he received the petitioner's invoice but that *he could not state beyond any doubt that the defendant's covering letter of solicitation was not included with the invoice* (p. 123).

5. William Graves testified that he was Bookkeeper for the Amerace Corporation (p. 123); that he received the petitioner's invoice which he received from his secretary which she received from the mailroom; that his company paid the invoice and that he could not state whether his company received a refund (p. 128); that *he could not state what was contained in the envelope received by his company* (pp. 129-130).

6. Kenneth Brooks testified that he was the Controller of I.C.M. Realty (p. 68); that he received the petitioner's invoice *after* it had been handled by the receptionist, accounts payable and the company's treasurer (pp. 71-72); that he paid the invoice and received no proof sheets; that *he could not state positively that the petitioner's covering letter of solicitation was not in the envelope* with the petitioner's invoice (p. 72).

7. Roy McMillan testified that he was in charge of Public Relations for Todd Shipyards, Inc. (p. 74); that he received the invoice (p. 74); that Todd's mail is first gotten at the Post Office and then handled by the mailroom (p. 78); that it is then opened by the manager of office services (p. 79); that *he did not know of his own knowledge what was in the envelope when it was opened.*

None of the above witnesses were present when the mail was opened and their testimony was objected to on the grounds of hearsay, which objection was overruled.

The other government witnesses were Florence Gabler, Evangelina Rojas, and Postal Inspector Johnson, who testified as follows:

8. Florence Gabler testified that she was self-employed

by A-1 Duplicating Service which was in the business of offset printing (p. 44); that *she printed 3,000* each of business reply envelopes, window envelopes and *covering solicitation letters* (p. 46); that the letters were single-folded (p. 48); that she gave the petitioner the courtesy of using her postage machine for which he paid (p. 49); that she did a "mock-up" for an invoice but did not print the same as the petitioner required multi-copies on NCR (copy paper without carbon) (p. 53); that she was questioned by Postal Inspector Johnson in an authoritarian manner (p. 55); that the petitioner had told her well prior to the government investigation that some of the girls from the building helped him stuff the envelopes (p. 57). Mrs. Gabler also testified that petitioner inquired of her husband as to whether he could handle the printing of petitioner's proposed directory (pp. 57-58).

9. Evangelina Rojas, whom the government called, testified that she lived with the petitioner for one year (p. 81); that Postal Inspector Johnson asked her if she had helped the petitioner stuff envelopes and that she stated she had with Ms. Claire and Mrs. Hopper (pp. 81-82); that the envelopes were stuffed with the invoice, the return envelope, and the covering letter of solicitation (p. 82); that in late January 1976, the petitioner told her that Mr. Johnson was going to call her to clear some things up (p. 83).

10. Postal Inspector Johnson stated that he was assigned to inviestigate President's Publishing Systems, Inc., in January 1976 (pp. 130-31); that he contacted Mrs. Gabler to ascertain who had used her postal meter to mail the invoices (p. 132); that he ascertained that the defendant had used her meter to send out the invoices (p. 133); that thereafter he was contacted by the petitioner by telephone and that an appointment was arranged but never kept. Thereafter, he was instead contacted by petitioner's attorney (p. 136). It was conceded by the government that on January 8, 1976, *Mr. Johnson unilaterally stopped the*

petitioner's mailings. He also testified that after the temporary restraining order was consented to by the petitioner in Court, the petitioner and Mr. Sands, his then attorney, went to the United States Attorney's Office where Mr. Johnson was supplied with the following information:

(a) The list to whom the mailings were sent;
(b) That President's Publishing System, Inc. was incorporated in Delaware; and
(c) That the covering envelopes were stuffed by Ms. Rojas, Ms. Claire and Mrs. Hopper (p. 137).

With respect to the obstruction of justice counts, there were two witnesses, Kari Hopper and Mary Ann Claire who testified as follows:

11. Kari Hopper testified that she was a flight attendant for American Airlines (pp. 170-71); that she was a friend of the petitioner (p. 171); that on January 23, 1976, the petitioner stated to both she and Ms. Claire that *somebody* would come and discuss some questions with them (p. 172); that the petitioner requested that she state that she put a bill, a return envelope, and a letter into a covering envelope for the petitioner, but, in fact, she had never done any stuffing for the petitioner (pp. 173-74). Ms. Hopper emphasized that the petitioner never indicated that the "someone" who would call was a postal inspector or governmental investigator.

12. Mary Anne Claire testified that she was a flight attendant for American Airlines (p. 192); that she was a good friend of the petitioner; that the petitioner stated that *someone* would contact her and wanted her to state that she had stuffed return envelopes, letters and invoices into covering envelopes; that the petitioner did not state who the person was, who would contact them, or what position he held, if any (pp. 194-95); and that she did not comply with the petitioner's request and told him so (p. 199).

Neither of the witnesses testified that the petitioner had urged them not to speak to the person who would contact them, nor did he misrepresent the importance or lack of importance of the matter. Both of the witnesses told Inspector Johnson their version of the facts, notwithstanding the petitioner's alleged requests.

The above constitutes the essential evidence adduced upon the trial in the District Court upon which the jury found its verdict. The petitioner respectfully states, among other things, that the same was insufficient to sustain said verdicts of guilty, and that the conviction below should be reversed.

2. The Petitioner's Case

At the conclusion of the government's case petitioner moved to dismiss all counts of the indictment. The court dismissed count 9 of the indictment and denied said motion with respect to all remaining counts of the indictment. Upon said motion being denied, Mr. St. Clair rested upon the presumption of innocence afforded each and every defendant under our criminal justice system.

He was found guilty on all counts.

REASONS FOR GRANTING WRIT

THE DECISION BELOW RAISES SERIOUS AND IMPORTANT QUESTIONS CONCERNING THE REQUIREMENT THAT A DEFENDANT BE CONVICTED BEYOND A REASONABLE DOUBT BASED UPON LEGALLY SUFFICIENT ADMISSABLE EVIDENCE.

A. The evidence which the government presented, taken in its most favorable light does not sustain a conviction under 18 U.S.C. Section 1341.

The trial record will disclose that the defendant reserved with the Secretary of State of Delaware the corporate name "President's Publishing Systems, Inc. (P.P.S.I.) without ever filing the corporate certificate. (pp. 139, 145).

Under the P.P.S.I. name defendant mailed out 2750 solicitations to various large companies throughout the United States for the purpose of getting subscriptions to a commercial directory which was to be printed at a later date. (p. 50). The government contended that the mailings consisted solely of invoices not containing a notice that the same were solicitations in the first instance, rather than billings for previously ordered listings. To reinforce this theory, the government proved that the mailings were sent in window envelopes directed to "accounts payable". (Exhibit 1 in evidence—p. 32). The government contended that the invoices were sent without a covering letter explaining that the mailing was in fact a solicitation.

The defendant's position is that whether or not notices of solicitation were sent with the invoices, the fact that he intended to publish the directory at a later date and the government's failure to affirmatively prove the contrary, negated any intent to defraud as required for a conviction under 18 U.S.C., Section 1341.

Mrs. Gabler, a government witness, testified that the defendant had a conversation with her husband who was doing printing for the defendant, inquiring as to whether Mr. Gabler could handle the printing of the President's Directory (pp. 57-58). Additionally, Postal Inspector Johnson testified that the defendant told him that the defendant contemplated using Mastercraft Printers in connection with P.P.S.I. (p. 169).

Defendant's original mailings were sent out after December 19, 1975 (p. 140) and after receiving complaints, Postal Inspector Johnson stopped defendant's mail on January 8, 1976, a period of just ninetten (19) days including three (3) weekends and the Christmas and New Year's holidays, leaving at best 11 business days. Thereafter, the petitioner was precluded from doing any further business in connection with the directory including the mailing of proof sheets and the production of the directory.

In direct contrast to the government's position, it has been consistently held that the mail fraud statute should not be construed to make criminally punishable conduct of sales organizations in which an "opening" approach to the potential customer includes some deception aimed only at giving the seller a better chance to receive the attention of the buyer. Instructive is the Second Circuit's ruling in the case of *United States v. Regent Office Supply Co.*, 421 F. 2d 1174 (2d Cir. 1970), in which Judge Moore, writing for a unanimous Panel, held that:

> "(The) solicitation of a purchase by means of false representations not directed to the quality, adequacy or price of goods to be sold, or otherwise to the nature of the bargain (will not) constitute a 'scheme to defraud' or 'obtaining money by false pretense' within the prohibition of 18 U.S.C., Section 1341 . . ." *id* at 1179.

Consistent with the holding in *Regent Office Supply, supra,* is the case of *Rude v. United States,* 74 F. 2d 673 (10th Cir. 1935), in which the defendant was convicted of selling inferior clothing merchandise through false advertising. The Tenth Circuit reversed, reasoning that:

> "Instead of proving a scheme to sell cheap, shoddy suits as those advertised, this evidence . . . established a scheme to attract customers into the store by false advertising . . . Such a scheme *does not* fall within the provision of (Section 1341) . . ." *Id.* at 677 (Emphasis supplied).

The Second Circuit noted in *Regent Office Supply Co., supra,* that "there are two elements to the offense of mail fraud: use of the mails *and* a scheme to defraud". 421 F. 2d at 1180. See also *United States v. Maze,* 414 U.S. 395, 405 (1974); *Pereira v. United States,* 347 U.S. 1, 8 (1954); *United States v. Keane,* 522 F. 2d 534 (7th Cir. 1975); *United States v. Greer,* 494 F. 2d 820, 823 (5th Cir. 1974); Note, *Survey of the Law of Mail Fraud,* 1975 U. Ill. L.F. 237, 240 (1975). Accordingly, the government must prove a scheme to defraud by establishing a *specific fraudulent intent* on the part of the defendant. See *Durland v. United States,* 161 U.S. 306 (1896); *United States v. Bryza,* 522 F. 2d 44 (7th Cir. 1975); *United States v. Prince,* 496 F. 2d 1289 (5th Cir. 1974), *cert. denied,* 419 U.S. 1107 (1975). Thus, fraudulent schemes in which the innocent are induced to give up without consideration some tangible or intangible interest establish an offense under Section 1341. For a description of the tangible and intangible interests encompassed by Section 1341, see *United States v. McNeive,* 536 F. 2d 1245, 1248-49 (8th Cir. 1976). This Honorable Court, however, reasoned in *Regent Office Supply Co.,* "(i)f *there is no proof that the defendants expected to get 'something for nothing'* . . . it is difficult to see any intent to injure or to defraud in the defendant's falsehoods." 421 F. 2d at 1181. (citations omitted). (Emphasis supplied).

At best the government proved that the Appellant mailed out 2750 invoices; that 5 companies did not receive the covering letter of solicitation; that the petitioner inquired of the printer as to the cost of printing the directory; that the government unilaterally stopped the petitioner from doing further business 19 days after he started; and that as a result thereof, petitioner did not send out proof sheets as he represented he would have.

Accordingly, it is respectfully submitted that taking the government's proof in its most favorable light the same did not establish a specific intent to defraud on the part of the appellant and therefore, the evidence was insufficient to prove appellant's guilt beyond a reasonable doubt with respect to violation of Title 18 USC Section 1341.

B. By establishing that only five companies had not received a notice of solicitation out of 2750 mailings, the government has failed to establish a fraudulent intent on the part of the defendant and a scheme to defraud.

It is firmly established that under 18 U.S.C., Section 1341, the government must establish beyond a reasonable doubt proof of a specific fraudulent intent by the defendant. See, e.g., *United States v. Bryza,* 522 F.2d 44 (7th Cir. 1975); *United States v. Payne,* 474 F.2d 603 (9th Cir. 1973). It is also well settled that the fraudulent intent necessary to constitute a scheme to defraud must involve a "systematic plan or a plan or theory of action," *M. Taylor, Law of Postal Frauds and Crimes,* 182 (1931), to get "something for nothing" or to injure the victim. See *Harrison v. United States,* 200 F. 662 (6th Cir. 1912).

Neither an intent to defraud nor a scheme to defraud was established by proof that only five companies out of 2750 did not receive a notice of solicitation.

It is axiomatic that to establish fraudulent intent, *the totality of the petitioner's actions must be considered. United States v. Bush,* 522 F. 2d 641 (7th Cir. 1975). As

one court noted, fraudulent intent is established 'from the modus operandi of the scheme." *United States v. Reid*, 533 F. 2d 1255, 1264 (D.C. Cir. 1976), *citing, United States v. Regent Office Supply Co.*, 421 F. 2d 1174, 1180-81 (2d Cir. 1970). Accordingly, the government, by establishing that only five companies out of 2750 companies failed to receive a notice of solicitation, left too much room for the jury to engage in speculation that no notice of solicitations were sent to any of the recipients of appellant's mailings. *Bailey v. U.S.*, 416 F. 2d 1110, 1116 (D.C. Cir. 1969). Treating the evidence in a light most favorable to the prosecution, it was established that less than .2% (2/10) per cent of the solicited firms did not receive the notice of solicitation. Thus, the evidence upon which the government rested its case was inconclusive at best and speculative at worst. Clearly, the case should not have been submitted to the jury for its consideration as a finding of guilty could be based only on conjecture and surmisal.

Instructive for our purposes is the Sixth Circuit's decision in *United States v. Rabinowitz*, 337 F. 2d 62 (6th Cir. 1964). There the defendant was charged with devising a scheme to defraud the public by inducing them by fraudulent representations to purchase certain sewing machines. The mail fraud conviction involved 689 purchasers of the machines. The Sixth Circuit reversed, recognizing that when, *inter alia*, only 14 out of 689 (2%) (two) per cent purchasers testified for the government, intent to defraud is not established. Id. at 80. Mindful, that it is not incumbent upon the government to prove each and every allegation of a fraudulent scheme, nonetheless, it is incumbent upon the government to prove "a sufficient number . . . to show that the scheme was actually set up . . . ." *Schaefer v. United States*, 265 F.2d 750, 753 (8th Cir. 1959). See also Comments, *Manual on Jury Instructions in Federal Criminal Cases*, 36 F.R.D. 457, 601-04.

Consequently, by establishing that only five out of 2750 companies failed to receive the notice of solicitation, as a matter of law, the evidence is insufficient to sustain a conviction. See generally *United States v. Reid*, 533 F.2d 255 (D.C. Cir. 1976); *United States v. Rabinowitz*, 327 F.2d 62 (6th Cir. 1964); *Schaefer v. United States*, 265 F.2d 750 (8th Cir. 1959); *McLendon v. United States*, 2 F.2d 660 (6th Cir. 1924). Though the circumstances in the instant case may arouse suspicions, even grave suspicion is not enough to support a conviction under 18 U.S.C., Section 1341. *Bailey v. United States*, 416 F.2d 1110, 1116 (D.C. Cir. 1969). Accordingly, it is respectfully urged that the government's proof was insufficient for the jury's consideration or to sustain a conviction of the defendant.

C. The sole evidence that no notice of solicitation was included with the invoices was improperly admitted as hearsay evidence.

It is another firmly established rule under 18 U.S.C., Section 1341, that it is only proper to introduce testimony by a recipient of a solicitation that the solicitation created a fraudulent impression on the recipient himself. *United States v. National Marketing, Inc.*, 306 F. Supp. 1238 (D. Minn. 1969). In the case at bar, it was the leading officers of the companies who testified that no notice of solicitation was received.(pp.34,40, 70, 75, 110, 121, 125). However, it is not those officers who were the recipients of the mailings. Rather, it was the mailroom help who were the recipients, and it is only from their testimony, if it had been offered, that the government could have established that no notice of solicitation was received. Notwithstanding all of the above, which is sufficient for the granting of the reversal, the Court is respectfully directed to the responses of each of the officer-witnesses, when on cross-examination, *each of them stated that they could not state beyond a reasonable doubt that the notice of solicitation was not received by their respective companies.*(pp.36, 43-44, 72, 80, 114, 123, 129-130).

Rule 602 of the *Federal Rules of Evidence* provides in pertinent part that:

> "A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter." *J. Weinstein, Weinstein's Evidence* Paragraph 602(01) (1975).

The Trial Judge must reject the evidence if "as a matter of law no trier of fact could find that the witness *actually received* the matter about which he is testifying." *Id.* at Paragraph 602(02). See also *United States v. Borelli,* 336 F.2d 366, 392 (2d Cir. 1964), *cert. denied sub. nom. Mogavero v. United States,* 397 U.S. 960 (1965); *United States v. Fernandez,* 480 F.2d 726, 739 (2d Cir. 1973).

The government failed to establish that the officers of the companies who testified were the actual recipients of the mailings. To the contrary, it was established at the trial that none of the witnesses were present when the mailings were opened, and further, that said mailings wece received second, third and/or fourth hand by the witnesses.(pp.35-36, 43, 71-72, 78-79, 112-113, 122, 129).

Accordingly, the evidence as to receipt of said mailings was inadmissible as hearsay. Thus, the key element of proof on the government's case is lacking. Consequently, the conviction of the petitioner on the mail fraud counts should be reversed.

D. The government should not have been allowed to prove that the petitioner did not intend to furnish proof sheets of corporate listings since the government unilaterally stopped the petitioner from continuing his business 19 days after he started said business.

The government, in attempting to demonstrate that the defendant did not intend to furnish the proof sheets, established only that two companies did not receive said

proof sheets of the corporate listings (p.71, 111). Clearly this evidence is grossly insufficient to establish that the defendant did not intend to furnish the proof sheets to each of the 2750 companies solicited by him for listings in the commercial directory.

It is well established that to be guilty of a crime, a person must responsibly engage in the action which constitutes the crime. *Easti v. District of Colombia,* 361 F.2d 50, 52 (D.C. Cir. 1966). See also *Hughes v. Rizzo,* 282 F. Supp. 881 (D. Pa. 1968). At the trial, Postal Inspector Johnson testified that he was informed that the envelopes were stuffed on December 19, 1975 (p. 140). The envelopes were mailed subsequent to that date. Mr. Johnson further testified that unilaterally stopped the defendant's mail on January 8, 1976, a period at a maximum of 19 days, which 19-day period included three (3) weekends and the Christmas-New Year holidays (p.156). Thus, by virtue of the government's own action, no further business involving the mailing or receipt of mail regarding the commercial directory could have possibly taken place. Consequently, the defendant could not furnish proof sheets of the listings to those companies who ordered the aforesaid listings *solely* because of Inspector Johnson's action in halting the defendant's mail. Thus, it is the government who is responsible for the alleged criminal action, *viz.* failing to furnish proof sheets of the listings.

By reason of the foregoing, it is respectfully urged that the evidence received by the Court that the defendant failed to supply proof sheets was inadmissible since it was the *government's action which prevented the defendant from mailing the same out,* and the convictions for mail fraud based in part upon the receipt of such evidence should be reversed as a matter of law. Thus the petition for certiorari should be granted.

THE DECISION BELOW RAISES SERIOUS AND IMPORTANT QUESTIONS AS TO WHETHER THE APPELLANT'S CONDUCT CONSTITUTED A VIOLATION OF TITLE 18 USC SECTION 1510(a)

A. By regarding the defendant's communications as a violation of Section 1510, the government seeks to expand the scope of the statute beyond the intent of the Congress.

Mrs. Hopper and Ms. Claire, formerly female acquaintances of the defendant, both testified that they had been contacted by the petitioner who told them, in substance, that someone would try to get in touch with them. (pp. 172, 183, 213). Petitioner also requested them to tell the person who contacted them that they had stuffed the envelopes with him and that they had included three items in each envelope: the invoice, a return envelope, and the crucial letter. (pp. 173-174, 194). Petitioner did not indicate to them why the requested story was important, but simply stated that it had something to do with business (p. 174). Additionally, neither of the witnesses testified that they were either intimidated or injured by the petitioner's alleged communications. To hold that such conduct constitutes a violation of the Obstruction of Justice statute would stretch its words beyond the intent of Congress.

The House Committee report stated that:

> "The sole purpose of the act is to protect informants and witnesses against *intimidation or injury by third parties* . . .". 1967 U.S. Code Cong. Admin. News 1760, 1762. (Emphasis supplied).

If this is the sole purpose of Section 1510, *viz.* to protect witnesses from *intimidation or injury by third persons*, then a "misrepresentation" to a witness by a defendant does not support this purpose. Congress, however, had a *specific*

and *important* purpose in including "misrepresentation" as the congressional debates *subsequent to the House Committee report* indicates.

While the bill, S. 676, was being debated before final passage by the House, a controversy arose as to whether "misrepresentation" should be omitted from the legislation. See *Remarks of Rep. Whitner*, 113 Cong. Rec. 27684 (Oct. 3, 1967). As several legislators noted "(t)he misrepresentation of facts by individuals contacted by law enforcement officers is an entirely different matter from bribery, intimidation, or the use of force to obstruct criminal investigations . . . The bill would be improved by striking the word 'misrepresentation'." *Additional views of Basil L. Whitner and William L. Hungate to House Rep. No. 658*, 1967 U.S. Code Cong. Admin. News 1765-66. Although the amendment to omit "misrepresentation" failed, Congress had clearly indicated that by not omitting "misrepresentation" from S. 676, it had only intended that provision to remain as a "weapon against organized crime." *Remarks of Rep. Rogers*, 113 Cong. Rec. 29406 (Oct. 19, 1967).

As Representative Cramer stated, the inclusion of the word "misrepresentation" had a "specific and important purpose . . ." *Id.* at 29404. This purpose was that in cases involving the Mafia and Cosa Nostra

> "membership in those criminal organizations alone could not necessarily be the basis of proof of participating in intimidation or threats of force and coercion, and, additionally, those are not usually the reasons for failure to obtain testimony. That failure is too often due only to a code of silence or loyalty. That is why 'misrepresentation' was put in, specifically, intentionally, and purposely, to make certain that those situations where a member of the Mafia or Cosa Nostra is involved

> as a witness or a procurer of a witness will be covered. And that is why 'misrepresentation' is included." *Id.*

The government never alleged the defendant to be a member of or have connection with the Mafia, Cosa Nostra, or any form of organized crime. To hold that the defendant's communications constituted a violation of Section 1510, therefore, clearly stretches the word beyond the intent of Congress. Again, "ambiguity concerning the ambit of criminal statutes should be resolved in favor of leniency". *Rewis v. United States*, 401 U.S. 808, 812 (1971), *quoted and applied in United States v. Bass*, 404 U.S. 336, 347-49 (1971); *United States v. Dixon*, 536 F.2d 1388, 1401 (2d Cir. 1976).

B. "The government failed to prove a necessary element of the crime of Obstruction of Justice, to wit: that the Appellant attempted to obstruct, delay or prevent the communication of information . . ."

The testimony of both Ms. Claire and Mrs. Hopper dovetailed in one respect, that is, that the petitioner told them that "someone" would get in touch with them. (pp. 172, 183, 213). No where in the record is there a statement by either Miss Claire or Mrs. Hopper that the defendant told them to in any manner avoid communicating with anyone concerning the investigation of said defendant.

In fact, the witnesses' testimony further paralleled each other in that they stated that it was their personal schedules and personal self-interests which delayed their contacting Postal Inspector Johnson, and only did contact Postal Inspector Johnson after Johnson had contacted their supervisor at American Airlines and threatened to withhold disembarkation of an international flight unless said witnesses called him immediately. They called Johnson five minutes later.(pp.176,206). In substance, they each stated that *they did not want to get involved*, and therefore, it was

not the defendant's actions which caused the delay in communicating information by the witnesses to the government agent. Consequently, it is respectfully requested that the petition for certiorari should be granted and the judgment below reversed.

THE DECISION BELOW RAISES SERIOUS AND IMPORTANT QUESTIONS CONCERNING THE APPELLANT'S RIGHT TO HAVE EFFECTIVE ASSISTANCE OF COUNSEL AND HIS RIGHT AGAINST SELF-INCRIMINATION UNDER THE FIFTH AND FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION

The Fifth Amendment of the United States Constitution guarantees every citizen a right against self-incrimination. This privilege can only be waived by a knowing and intelligent waiver. *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602 (1966). The defendant, in supplying culpatory information to the government at the January 23, 1976 meeting, did not make a knowing and intelligent waiver of his right against self-incrimination.

The Supreme Court in *Power v. Ala.*, 287 U.S. 45 (1932) established that the Sixth Amendment of the Constitution guarantees the right to effective assistance of counsel. The defendant clearly was denied this right through his initial representation by Harry Sands, Esq., which resulted in Appellant's giving evidence against himself without being made aware of the possible consequences, which, in the case at bar, resulted in his indictment and conviction, and without which the government could never have prosecuted the appellant.

At the pre-trial hearing on the motion to suppress the evidence, the defendant testified that when he engaged Mr. Sands as his attorney, Mr. Sands represented that he was

". . . a former Federal Judge and highly experiened in handling federal matters . . .". (pp. 66-67). At the same hearing when Mr. Sands was questioned by Mr. Michelman, defendant's trial counsel, Mr. Sands was asked by whom he was employed to which he responded: "I am retired, a Federal Judge employed by nobody."

The following questions and answers were then propounded by counsel and answered by the witness, Mr. Sands: (P. 46, line 9-p. 48, line 3)

Q. When did you retire as a Federal Judge?

A. 1974.

Q. Was that in the Eastern District of New York that you sat as a judge?

A. I sat all over the country as a judge. I was an Administrative Law Judge. My office was in Jamaica.

Q. Jamaica, Queens?

A. That is right.

Q. As an Administrative Law Judge, what agency did you work for?

A. Social Security.

Q. How long had you done that?

A. I was a federal employee for 33 years. I worked first for the Veterans Administration then I became what was known as a Hearing Examiner for Social Security and worked in Cincinnati. Then I came to New York and was an Administrative Judge for 18 years and the Chief Judge in the Jamaica Office.

Q. Mr. Sands, prior to your being engaged by Mr. St. Clair, how many criminal matters had you handled?

A. Before I went into the Army in 1945 I was

engaged in the active practice of law for 15 years. I tried criminal, civil, federal cases, any case you can think of, for 15 years.

Q. How many criminal cases did you try after you retired as a Federal Judge?

A. Since I retired in 1974 I believe I have tried, not in the Federal Court but in the State Court, in the Court of Long Beach, at least 20.

Q. The Court of Long Beach is a local court where the limitations of crime is a misdemeanor, am I right?

A. Yes.

Q. Did you ever try any felony cases?

A. Yes, in the County Court of Queens.

Q. In the County Court?

A. Yes, and a criminal case in Nassau County in Mineola.

MR. MICHELMAN: I would like the Court to take judicial notice that there has not been a County Court in Queens since 1961.

Thus, the record clearly establishes that Mr. Sands was not a federal judge within the laymen's understanding of what a federal judge is, but was an Administrative Judge for the Social Security Administration and further that he had no experience in trying federal criminal cases and that at best, since 1945 he tried no more than 20 cases in State Court and in the City Court of Long Beach which is equivalent to a Magistrate's Court, empowered to try traffic violations and minor misdemeanors.

Accordingly, the defendant was mistakenly lulled into the belief that he was being represented by competent counsel. Mr. Sands' incompetence with respect to his representation of petitioner is obvious and the record

clearly indicates this. By virtue of the ineffective assistance of counsel, which violates defendant's Sixth Amendment rights, he did not have sufficient knowledge of his Fifth Amendment rights to make a knowing and intelligent waiver thereof.

Thus, on January 23, 1976 when the defendant and Mr. Sands on one hand, and the United States Attorney and the Postal Inspector appeared before Judge Weinstein for the purpose of the defendant's consent to a temporary restraining order restraining him from further proceeding in his business, the defendant was in a state of mind that he believed that the matter was being completed.

Giving further strength to this argument, Asst. U.S. Attorney Gould testified at the hearing on the motion to suppress the evidence that in fact Judge Weinstein stated that there was no need for this case to proceed as a criminal matter. (p. 32). The petitioner, therefore, believing that the entire matter was about to be closed, proceeded to the Asst. U.S. Attorney's office with Mr. Sands without the benefit of Mr. Sands consulting with him as to what would take place at the U.S. Attorney's Office, or what the consequences might be if the appellant supplied the government with inculpatory evidence or alternatively, that the petitioner was under no obligation to make any statements whatsoever to the United States Attorney.

The government may not have been required to give the defendant his Miranda warnings at the January 23, 1976 meeting, however, it was clearly Mr. Sands' duty to inform the defendant of his right against self-incrimination. In fact the evidence establishes that Mr. Sands told the defendant that he had to give the government certain culpatory evidence, viz, the names of the individuals who assisted the defendant in the mailing (p. 55-56). In addition to those names the appellant either personally, or through his counsel, supplied the names of the printers, a list of the companies to which the mailings had been sent

and other information, all of which was ultimately used before the Grand Jury as the key evidence upon which the indictment was founded. Because of this grossly ineffective assistance of counsel, the appellant clearly could not have made a knowing and intelligent waiver of his right against self-incrimination when he furnished that culpatory evidence to the government at the January 23, 1976 meeting.

A further fact which re-enforces the defendant's argument that he did not make a knowing and intelligent waiver of his rights against self-incrimination, is that *three [3] days after his meeting at the United States Attorney's Office*, to wit: on January 26, 1976, a Consent Agreement was executed between the defendant and the government whereby the defendant agreed to completely refrain from any business related to this commercial directory and the sending and mailing of any solicitations, invoices, etc., in consideration of the government's agreement not to prosecute the defendant under Title 39, U.S.C. Section 3005, the statute specifically referring to the mailing of invoices without notices of solicitation. There would have been no reason whatsoever for petitioner to execute this consent agreement, if he did not believe the matter was settled.

It is therefore the petitioner's position that by reason of the ineffective assistance of counsel rendered by Mr. Sands, he did not know that the statements which he furnished to the United States Attorney and the Postal Inspector could and would have been used as evidence against him upon a criminal proceeding, as the total basis for appellant's indictment and his ultimate conviction.

Thus, there was no knowing and intelligent waiver of the defendant's rights against self-incrimination and the motion to suppress the evidence furnished by the defendant to the government which served as the basis for the indictment, should have been granted and the indictment dismissed.

CONCLUSION

THE PETITION FOR CERTIORARI SHOULD BE GRANTED AND THE JUDGMENT BELOW REVERSED.

Respectfully submitted,

MARTIN JAY SIEGEL
Attorney for Petitioner
MICHELMAN & MICHELMAN
Attorneys for Petitioner

HARVEY J. MICHELMAN, *of Counsel*
JERRY DE LUISE, *on the Petition*

APPENDIX A

United States Court of Appeals for the Second Circuit

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the seventeenth day of March, one thousand nine hundred and seventy-seven.

Present: Hon. J. Edward Lumbard, Hon. William H. Timbers, *Circuit Judges.* Hon. Oscar H. Davis, *Judge,* U.S. Court of Claims sitting by designation.

No. 76-1541

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

E. GARRISON ST. CLAIR.

Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO, *Clerk*

APPENDIX B

Notice of Motion

United States District Court : Eastern District of New York

76 Cr 246

UNITED STATES OF AMERICA,

-against-

E. GARRISON ST. CLAIR,
Defendant.

S I R S :

PLEASE TAKE NOTICE, that upon the annexed affidavit of E. GARRISON ST. CLAIR, duly sworn the 16th day of June, 1976, upon the indictment and all the proceedings heretofore had herein, the defendant, E. GARRISON ST. CLAIR, will move this Court before the Honorable G. C. Pratt, on the day of June, 1976, in Room at the United States Courthouse, 225 Cadman Plaza East, Brooklyn, New York, for an order granting the following relief:

I. Pursuant to Rule 5 of the Federal Rules of Criminal Procedure, for an order:

(a) Suppression of evidence and statements fraudulently obtained by the Government; and

II. Pursuant to Rule 12 of the Federal Rules of Criminal Procedure, an order:

(b) Dismissing the indictment,

AND for such other and further relief as this Court may deem just and proper under the circumstances.

Dated: New York, New York
June 16, 1976

Yours, etc.

HARVEY J. MICHELMAN

Affidavit in Support

State of New York
County of New York

E. GARRISON ST. CLAIR, being duly sworn, deposes and says:

That I am the defendant in the within action and make this affidavit in support of the instant motion for (1) suppression of evidence and statements; and (2) dismissal of the indictment.

The motion should be granted because all of the evidence which was presented before the Grand Jury with respect to Counts 1 through 6 of the Indictment, was obtained by virtue of a fraud perpetrated upon me by the United States Attorney's Office and the United States Postal Service.

To begin with, sometime in early January, 1976, I was contacted by Postal Inspector, T. F. Johnson, who requested that I come in and speak with him regarding a solicitation by Presidents' Publishing Systems, Inc., a corporation which I caused to be formed in the State of Delaware.

Mr. Johnson informed me that he felt that my solicitations for listings in a business directory which I intended to publish were not in conformity with Title 39, U.S.C. 3005, and that I should cease and desist making further solicitations.

I retained counsel, Harry J. Sands, and after extensive meetings with both Mr. Johnson and Asst. U.S. Attorney DePetris, I disclosed the totality of my operations and agreed to cease and desist in consideration of the Government's entering into a Consent Agreement with me, a copy of which is annexed hereto, marked exhibit "A", and made a part hereof.

It was my understanding that the supplying of the in-

formation, and the execution of the Consent Agreement would result in a termination of the proceedings by the United States Government against me with respect to the subject matter, to wit: Presidents' Publishing Systems, Inc. and "Bicentennial First Edition of the 1976 Presidents Directory of Business and Commerce in the United States".

When I was indicted in April, 1976, I felt it was a mistake as I relied upon the understanding reached with the U.S. Attorney's office that the matter was closed. Not being an attorney, and relying upon advice of Mr. Sands that the matter was in fact closed, I thought the mistake could be cleared up by a conference with the United States Attorney. I realize now that my belief was erroneous.

I am advised by my present attorney, Harvey J. Michelman, that while the double jeopardy clause of the United States Constitution does not in fact bar a criminal proceeding with respect to matters which have been adjudicated or settled in a civil proceeding involving the same subject matter, the interests of justice dictate that the information gained from me as the result of my being misled by the United States Attorney's Office, was obtained fraudulently and in derrogation of my rights against self-incrimination and that all evidence which was gathered from the information which I gave to the Government would be like "fruits on poisonous tree" and should likewise be suppressed.

The fact remains that I did not know that I was violating the law and I did not intend to do so and when asked by the United States relying upon his representations to me that the matter would be disposed of fully.

I made no intelligent waiver of my rights against self-incrimination, nor did I breach the Consent Agreement entered into between myself and the United States Government on January 26, 1976.

Accordingly, I respectfully request that this Court order a hearing to determine the voluntariness of my statements and a suppression thereof, together with a suppression of all evidence gathered by the fraudulent tactics of the Government. The granting of these motions would in fact leave insufficient evidence upon which this indictment could be found and accordingly, a dismissal of the indictment.

[s/E. Garrison St. Clair]

Affidavit in Opposition

State of New York
County of Kings

DOUGLAS J. KRAMER, being duly sworn, deposes and says:

1. I am an Assistant United States Attorney in the office of David G. Trager, United States Attorney for the Eastern District of New York, and have been assigned the prosecution of the above-captioned action. I make this affidavit in opposition to the defendant's motions to suppress certain evidence and to dismiss the indictment.

2. Defendant alleges that all of the evidence presented to the Grand Jury with respect to Counts 1 through 6 of the Indictment was obtained by virtue of a fraud perpetrated by the United States Attorney's Office and the United States Postal Service.

3. Defendant alleges that he attended "extensive meetings" with a Postal Inspector, T. F. Johnson, and an Assistant U.S. Attorney, DePetris, during which he was fraudulently induced to disclose "the totality of (his) operations."

4. Based on information supplied your deponent by Messrs. Johnson and DePetris, the following is a true and accurate summary of all contacts between the defendant and said persons:

a) On or about January 8, 1976 the defendant spoke with Postal Inspector Johnson telephonically concerning a certain administrative proceeding under Title 39, U.S.C., Section 3005 *et seq.*, at which time the defendant advised Mr. Johnson, *inter alia*, that he had mailed solicitation letters, along with invoices.

b) On or about January 23, 1976, three days after the execution of the consent order annexed as Exhibit A to defendant's affidavit, the defendant and his attorney,

Harry J. Sands, met with Messrs. Johnson and DePetris in Mr. DePetris's office. Initially the meeting took place without the defendant present. His attorney was advised that the Government was investigating possible mail fraud in connection with Presidents' Publishing Systems, Inc., of which the defendant was the president. It was further explained that this criminal investigation was completely separate and apart from the previous civil and administrative proceedings. The defendant's attorney was asked to supply the names of those persons who assisted in preparing certain mailings. The attorney left the room and returned with the names of three women and their addresses. Additional information was requested, at which point the attorney called the defendant into Mr. DePetris' office. In response to a question from Mr. Johnson, the defendant stated that his corporation was incorporated in Delaware. He was told of the plans of the Government to speal with the three women assistants and was warned that these interviews would be part of a criminal investigation. The defendant was also warned that any attempt to influence the testimony of these persons might constitute a separate criminal offense, obstruction of justice. The defendant acknowledged this information and indicated that he would contact the three girls only to advise them that they would be contacted.

5. No other meetings were had between Messrs. Johnson and DePetris and the defendant.

6. On April 6, 1976 an indictment was returned against the defendant.

7. At no time was it ever stated or intimated that settlement of the administrative proceeding, *In the Matter of the Complaint Against Presidents' Publishing System, Inc.*, P.S. Docket No. 4/149, or of the civil action, *United States Postal Service* v. *E. Garrison St. Clair, d/b/a Presidents' Publishing System, Inc.*, E.D.N.Y., Civil Action No. 76 C 157, would in any way effect the in-

vestigation and possible criminal prosecution of the defendant. Indeed, the Consent Agreement, at paragraph 5, expressly sets this out.

WHEREFORE, it is respectfully requested that defendant's motions be denied.

Dated: Brooklyn, New York
June 18, 1976

[S/Douglas J. Kramer,
Assistant U.S. Attorney]